1229 FILE COPY

Supreme Court, U. S.
FILED
MAR 9 1973
MICHAEL RODAK, JR., CLERK

No. 72-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1229

ALYESKA PIPELINE SERVICE COMPANY, PETITIONER

v.

THE WILDERNESS SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAUL F. MICKEY
ROBERT E. JORDAN, III
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Alyeska Pipeline Service Company

Of Counsel:

QUINN O'CONNELL
CONNOLE & O'CONNELL
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

JOHN D. KNODELL, JR.
General Counsel
Alyeska Pipeline Service Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

ALYESKA PIPELINE SERVICE COMPANY, PETITIONER

v.

THE WILDERNESS SOCIETY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the District Court is not yet reported but appears as an appendix to the petition of the Solicitor General. (Appendix D at p. 179a.) The opinion of the Court of Appeals is unreported as well and also appears as an appendix to the petition filed by the Solicitor General. (Appendix A, pp. 1a-137a.)

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1973, and is reproduced as an appendix to the petition filed by the Solicitor General. (Appendix B, pp. 139a-141a.) The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

We adopt the statement of questions presented which appears in the petition of the Solicitor General.

STATUTES INVOLVED

We concur in the designation of the statutes involved which appears in the petition filed by the Solicitor General.

STATEMENT

We adopt the statement which is set forth in the petition of the Solicitor General.

REASONS FOR GRANTING THE WRIT

Alyeska generally supports the reasons for granting certiorari which are set forth in the petitions filed by the Solicitor General on behalf of the federal defendants and by counsel for the State of Alaska. These petitions fully elaborate the compelling governmental interests, both national and state, which make this case appropriate for review by this Court.

Alyeska acknowledges that these governmental interests present the principal reasons for granting certiorari. However, there are in addition significant private interests adversely affected by the decision of the Court of Appeals. These interests too are of sufficient magnitude to warrant further review.

Through the first quarter of calendar 1973, expenditures and commitments of funds for the operation of Alyeska Pipeline Service Company totaled more than $400 million. In addition to funding these expenses of Alyeska, the companies which own Alyeska have invested approximately an additional $1 billion in leasing, exploration and development costs relating to the Prudhoe Bay producing area. Furthermore, other companies which are not owners of Alyeska Pipeline Service Company, but which have interests in leases in the Prudhoe Bay area, have expended several hundred million dollars for lease, exploration and development costs. All of these companies are dependent upon the proposed pipeline as a means for transportation of any oil which has been discovered.

Apart from the expenses already incurred for leases, exploration, development and pipeline planning, delay in itself represents a substantial cost penalty for the participating companies. Alyeska estimates that one year of delay in pipeline construction increases the cost of the pipeline by approximately $180 million. The ten months which have elapsed since the Secretary's decision have thus increased costs by $150 million; each week of further delay will increase costs by another $3.5 million.

The companies which are participating in exploration and development of the important petroleum reserves on the North Slope of Alaska have made these enormous expenditures with, we submit, a wholly reasonable expectation that it would be possible to obtain some return on this investment once the Secretary of the Interior had satisfied himself concerning the environmental protection features of the proposed pipe-

line and possible alternative transportation systems. The companies involved also assumed, again reasonably, that pipeline construction activities would be permitted in accordance with practices familiar to the industry for at least 50 years—that is, that licenses to use federal lands for temporary purposes incident to construction would be available to the extent of reasonable requirements compelled by the realities of pipeline construction.

As the petition of the Solicitor General notes, and as the Court of Appeals itself conceded, the holding below not only would preclude the present authorization of the trans-Alaska pipeline, but would make it impossible to build or maintain any large diameter pipeline across public lands. A partial industry survey by Alyeska of ongoing and announced oil, gas and petroleum products pipeline projects indicates that nine such projects involving approximately 2,200 miles of pipeline and costing approximately $235 million, would be threatened if the decision below is permitted to stand.

These serious impacts on private industry are an additional reason for granting the petitions for a writ of certiorari, and for granting the motion of the Solicitor General for expedited consideration, a motion which Alyeska joins and supports.

BLEED THROUGH POOR COPY

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL F. MICKEY
ROBERT E. JORDAN, III
Attorneys for Petitioner

Of Counsel:

QUINN O'CONNELL

JOHN D. KNODELL, JR.

March 1973

FILED
MAR 28 1973
MICHAEL RODAK, JR., CLERK

Nos. 72-1227, 1228, 1229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENNIS M. FLANNERY
JOHN F. DIENELT
THOMAS B. STOEL, JR.
1751 N Street, N.W.
Washington, D.C. 20036
Attorneys for The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth

EDWARD BERLIN
1712 N Street, N.W.
Washington, D.C. 20036
Attorney for David Anderson and Canadian Wildlife Federation

THOMAS F. HOGAN
WARREN W. MATTHEWS, JR.
THEODORE R. DUNN
100 South Washington Street
Rockville, Maryland 20850
Attorneys for The Cordova District Fisheries Union

Of Counsel:

VICTOR H. KRAMER
600 New Jersey Ave., N.W.
Washington, D.C.

PHILIP ELMAN
1320 19th Street, N.W.
Washington, D.C.

JAMES W. MOORMAN
311 California Street
San Francisco, California

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
STATEMENT	1
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	4
IT IS FOR CONGRESS, NOT THE COURTS, TO DETERMINE WHETHER THE MINERAL LEASING ACT SHOULD BE AMENDED	4
THE NEPA ISSUES ARE NOT IN AN APPROPRIATE POSTURE FOR REVIEW BY THIS COURT	9
CONCLUSION	20

CITATIONS

Constitution:

U.S. Const. art. IV, § 3, cl. 2 8

Cases:

Poe v. *Ullman*, 367 U.S. 497 (1961) 10

Rules of Court:

Supreme Court Rule 19 9
Supreme Court Rule 23 10

Statutes:

Alaska Native Claims Settlement Act, 85 Stat. 688, *et seq.* 7
Mineral Leasing Act of 1920, Section 28, 30 U.S.C. 185 ..... *passim*
National Environmental Policy Act of 1969, 42 U.S.C. 4331 *et seq.* 3, 9, 16, 17

Legislative Material:

H.R. Rep. 92-746, 92d Cong., 1st Sess. (1971) 7

INDEX—Continued

Page

Hearings, Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (April 29, 1971) 13

Hearings, Senate Committees on Public Works and Interior and Insular Affairs, 92d Cong., 2d Sess. (1972) 13

Hearings Before the Senate Interior and Insular Affairs Committee on Pending Legislation to Establish a Federal Policy Concerning the Granting of Rights-of-Way Across Federal Lands, 93d Cong., 1st Sess. (1973) 8, 18

S. 970, S. 993, S. 1040, S. 1041, S. 1056, S. 1081, H.R. 4651, H.R. 4707, and H.R. 5750, 93d Cong., 1st Sess. (1973) 7-8, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-1227, 1228, 1229

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

The petitions for certiorari present no issue which warrants further review by this Court. In urging this position, respondents [1] rely principally upon the

---

[1] The principal respondents in the case are three environmental organizations, The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth, who are the original plaintiffs in the Alaska Pipeline litigation. The other respondents are David Anderson and Canadian Wildlife Federation, who were allowed to intervene in *The Wilderness*

careful and comprehensive analysis of the issues contained in the exhaustive opinion of the court of appeals, sitting *en banc*. Gov. Pet. App. A.

In reaching the unanimous conclusion that Congress must decide whether to amend the Mineral Leasing Act of 1920, all seven judges who heard the case were keenly aware of "the obvious magnitude and current importance of the interests at stake." Gov. Pet. App. A 93a. But the petitioners could not convince even one of the judges that the relief they seek should be obtained from the courts, rather than from the Congress. The essence of the decision below, as the court of appeals noted, "is as settled as it is simple." Gov. Pet. App. A 94a.

> "Congress, by enacting Section 28, allowed pipeline companies to use a certain amount of land to construct their pipelines. These companies have now come into court, accompanied by the executive agency authorized to administer the statute, and have said, 'This is not enough land; give us more.' We have no more power to grant their request, of course, than we have the power

---

Society suit by order dated May 11, 1972, and The Cordova District Fisheries Union, whose separate suit (filed on April 28, 1971) was consolidated with *The Wilderness Society* suit.

All respondents join in this opposition. In the remainder of this brief, however, the term "respondents" refers, unless otherwise stated, to The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth.

to increase congressional appropriations to needy recipients.

* * * *

"We think it plain that the Executive Branch, when confronted with the legal problems attendant upon the Alaska pipeline, should have taken note of the limitations that had been prescribed by Congress, and should have presented to Congress the case for revision of the basic statute." Gov. Pet. App. A, 93a-94a, 97a.

Judge Wilkey, concurring in the court's Mineral Leasing Act decision, stated: "Regrettably, the would-be builders of the Alaska Pipeline sought from the courts rather than Congress clearly necessary changes in the statutory restrictions on the use of public lands." *Id.*, at 137a. Judge MacKinnon, in his separate opinion, agreed: "Alyeska must now go to Congress for an amendment. . . . That is regrettable . . . but it is Congress that has the legislative power and not this court." *Id.*, at 122a.

Petitioners devote a considerable portion of their petitions to broad and potentially complex issues, neither reached nor considered by the court of appeals, relating to the National Environmental Policy Act ("NEPA"). Those issues are not in a proper posture for review by the court at this time and do not provide an additional basis, apart from the Mineral Leasing Act issues, for granting review. As noted by the court of appeals, pending a Congressional resolution of the Mineral Leasing Act issues, the present

"analysis of environmental, economic and other costs . . . may become outdated, and in its updating the Department conceivably might introduce changes mooting anything we might say about its present adequacy or inadequacy." Gov. Pet. App. A 90a. As demonstrated at pages 16-19, *infra*, legislative and other developments have already confirmed the correctness of this conclusion.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

IT IS FOR CONGRESS, NOT THE COURTS, TO DETERMINE WHETHER THE MINERAL LEASING ACT SHOULD BE AMENDED

1. The court of appeals considered the Mineral Leasing Act issues in meticulous detail. Every canon of statutory interpretation dictates the court's unanimous conclusion that construction of the Alaska Pipeline would violate the Mineral Leasing Act. These include the plain meaning of the statute (Gov. Pet. App. A 16a-23a), its legislative history (*id.*, at 23a-39a), its contemporaneous interpretation by the agency charged with its administration (*id.*, at 21a), and the settled construction of the administrative regulations of that agency (*id.*, at 40a-62a).

In their briefs, petitioners essentially ignore the added fact that an amount of land much wider than that provided for in the Mineral Leasing Act is permanently necessary for access and maintenance, as well as construction, of the pipeline. It was on this point that Judge MacKinnon joined the other six judges in the conclusion that Congressional approval is nec-

essary. The Government's assertion that all that will be needed are "temporary permits for access and maintenance" (Gov. Pet. 23) is simply untrue. See Gov. Pet. App. A 56a-61a; Gov. Pet. App. A 119a-123a.

2. The court of appeals was also correct in concluding that the unambiguous proscription of the Mineral Leasing Act is not overcome by what petitioners' counsel now attempt to characterize as "long standing and consistent administrative interpretation of the statute" (Gov. Pet. 23-24). No such established interpretation exists. As the court of appeals held, it is to be found nowhere in "a formal rule or through any other 'expressly articulated position at the administrative level.' " Gov. Pet. App. A 47a.

The court further noted the irony that the same parties who now assert the existence of a "settled and well known administrative practice . . . apparently did not know about the practice" when the first application for rights of way was made in 1969. Gov. Pet. App. A 45a-46a. The result, moreover, of a subsequent three-year search by petitioners' counsel into the files of Interior Department field offices produced no more than a handful of isolated, vague, and inconclusive low-level administrative lapses to which the court of appeals properly gave little weight. Gov. Pet. App. A 51a.[2]

[2] The three-year search (1969-1972) by petitioners' counsel uncovered exactly five documented instances—none occurring prior to 1960—in which Interior Department field offices were

3. The decision of the court of appeals was not petitioners' first indication that the Mineral Leasing Act stood as a threshold bar to the Alaska Pipeline.[3]

---

requested to issue or did issue construction-related special land use permits for pipelines. Three of them involved a total distance of less than 32 miles. The fourth appeared to be merely an undated application with no permit attached. And the fifth was issued almost a full year after the district court's preliminary injunction in the instant case. (Government's Brief to the Court of Appeals, Appendix B). Petitioners' counsel endeavored to supplement this scanty showing with affidavits by field-level Interior Department employees and industry pipeliners. Collectively, these affidavits identified only four specific instances in which pipeliners were alleged to have been given even informal access to public lands outside the statutory right-of-way. The earliest such instance identified was alleged to have occurred in 1953. And, no indication was given in the affidavits as to the actual amount of additional public land affected. (Alyeska Supplemental Documents I, Tabs 1-9).

The court's conclusion—"that this history [n]either merits our deference [n]or leads us to ignore an ascertainable legislative will to restrict construction activities to the statutory right-of-way," Gov. Pet. App. A 51a—is not merely correct. It is a charitable understatement.

[3] Indeed, in a cover letter to the Undersecretary of the Interior submitting the oil companies' initial permit application of June 6, 1969, their attorney Kenneth P. Fountain acknowledged that:

> "*The 54' R.O.W.* [*right of way*] *width which is allowed by statute is not adequate for the construction of a 48" pipeline.* The R.O.W. should be 100' width to accommodate the extremely large equipment that is necessary to handle the 48" pipe, and the large spoil [from] excavated soil . . . ." (Emphasis added.) Respondents' "Rule 9(h) Documents," Tab B.

The Mineral Leasing Act was a principal basis on which the district court issued its preliminary injunction in this case three years ago. *Wilderness Society* v. *Hickel*, 325 F.Supp. 422, 423-24 (D.D.C., April 28, 1970) (Findings ¶ 2, Conclusions ¶ 5). See Gov. Pet. App. E 183a-185a. Yet, despite this unambiguous early warning, petitioners did nothing to bring the matter to the attention of Congress and to seek a calm and dispassionate legislative resolution.[4]

The matter has now, however, finally been presented squarely to Congress. Within the past few weeks bills have been introduced seeking to amend the Mineral Leasing Act (S. 1040, S. 1056, and H.R. 4651), to update all public land laws dealing with

---

[4] The Congressional hearings cited at Gov. Pet. 24 n. 14 and Ala. Pet. 25 n. 9 were also cited in petitioners' briefs to the court of appeals. All of these hearings preceded even the preliminary injunction in this case. None was addressed to the underlying legality of the Secretary's proposed action.

The Government's citation to the Alaska Native Claims Settlement Act of 1971, Gov. Pet. 24-25, (which was also cited in petitioners' briefs to the court of appeals) defies understanding. When the Act was passed, the preliminary injunction in this case was still in effect. The legislative history of the Act unambiguously states that (a) neither the conference committee nor the House or Senate Committees "consider[ed] the proposed pipeline" in their deliberations; and that (b) if "the Secretary should . . . decide to grant the necessary permits, nothing . . . should be construed in any manner to limit, diminish, or condition the Secretary's *existing authority* to take any action required to implement this decision." (Emphasis added.) H.R. Rep. 92-746, 92d Cong., 1st Sess. 46 (1971).

rights-of-way (S. 1041 and S. 1081), to approve the Alaska Pipeline project (S. 970), to approve an alternative trans-Alaska-Canada project (S. 993, H.R. 4707), and to authorize an independent Congressional review that would lead to a prompt and final approval by Congress of either the Alaska Pipeline project or an alternative trans-Alaska-Canada project (H.R. 5750). Hearings have already commenced on several of the bills. *Hearings Before the Senate Interior and Insular Affairs Committee on Pending Legislation to Establish a Federal Policy Concerning the Granting of Rights-of-Way Across Federal Lands*, 93d Cong., 1st Sess. (March 9 and March 27, 1973). At long last, therefore, the matter is where it belongs, not in the courts but before Congress which has the plenary power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

4. Finally, the decision below is not only clearly correct but does not conflict with the decision of any other circuit and has no impact on any public land law other than the Mineral Leasing Act. See Gov. Pet. App. A 48a-51a. The decision may, of course, lead to a new look by Congress at the need for a general updating of the current right-of-way laws, which have been enacted haphazardly over the course of a hundred years. But that, again, is a project not for the courts but for the Congress, the branch of government with plenary power over the public lands.

There is no justification, under the considerations governing review on certiorari set forth in Rule 19 of this Court's Rules, for further judicial review of the Mineral Leasing Act issues. The important policy issues underlying the litigation constitute, we submit, a compelling reason to deny the writ, not to grant it. Petitioners should take their case for obtaining use of the public lands to Congress, where the policy issues they raise in their briefs may be debated and resolved on the merits.

THE NEPA ISSUES ARE NOT IN AN APPROPRIATE POSTURE FOR REVIEW BY THIS COURT

1. Respondents submit that the threshold Mineral Leasing Act issues alone should determine the disposition of the petitions for certiorari. There has been no opinion rendered by the court of appeals on the potential NEPA issues in the case. Nor are there any useful findings and conclusions by the district court on those issues. See Gov. Pet. App. D 179a-182a.

Accordingly, if this Court should grant the petitions for certiorari, respondents respectfully suggest that the review be limited to the Mineral Leasing Act issues. Were the Court to reverse the court of appeals' unanimous conclusion that the Mineral Leasing Act is a threshold bar to the Alaska Pipeline, it would then appear appropriate to remand the case to the court of appeals for reconsideration of its disposition of the NEPA issues. For the court of appeals' decision not to address those issues rests primarily on the

court's conclusion that the NEPA issues are not ripe for adjudication so long as it is necessary for Congress to act before the Alaska Pipeline can be approved.

2. If the court of appeals was correct in its Mineral Leasing Act decision (and, as we have already indicated, it clearly was), its decision not to address the NEPA issues was a sound exercise of judicial discretion, amply supported by decisions of this Court. *E.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 503 (1961); *id.*, at 528 (Mr. Justice Harlan, dissenting). The court of appeals correctly reasoned that the need for prior Congressional approval renders the NEPA issues [5]

---

[5] The NEPA issues specifically raised by respondents below (and considered by them to be set forth in Question 3 of the instant petitions or fairly comprised therein, Sup. Ct. Rule 23 1 (c)) are, as set forth in respondents' brief to the court of appeals:

"I. Whether the Secretary has complied with the Act's requirement that he consider the alternative of oil and gas pipelines in a common corridor through Canada, when he: (a) did not systematically analyze the apparent advantages of this alternative; and (b) devoted nearly all his efforts to the study of the proposal of the applicant oil companies.

"II. Whether the Secretary has complied with the Act's requirement that he consider the alternative of deferring decision, when he did not evaluate the benefits of deferral in reducing environmental degradation.

"III. Whether his "Final Impact Statement" was a proper final statement when an adequate draft statement never was prepared.

"IV. Whether the Secretary's decision was arbitrary and capricious because it was based upon speculation regard-

remote and that Congressional action could moot, or developments pending Congressional action could alter, the balance of economic, environmental, and other factors bearing on a final resolution of the NEPA issues.

The result reached by the court of appeals is, incidentally, precisely the result that respondents had urged the district court to reach some nine months before the court of appeals rendered its decision.[6] As will be seen at pages 16-19, *infra*, the correctness of the result reached below is corroborated by legislative and other developments that have already occurred.

---

ing factors about which concrete information could have been obtained."

[6] On May 12, 1972, the day after Secretary Morton announced his decision to approve the Alaska Pipeline, respondents filed in district court a Motion for Partial Summary Judgment on the Mineral Leasing Act issues, together with a 48-page brief on those issues. The Motion stated, in pertinent part:

> "[T]he Mineral Leasing Act issues present threshold questions. . . ; the NEPA issues need be adjudicated only if the permits contemplated by the Secretary are not prohibited by the Mineral Leasing Act; and if said permits are prohibited by the Mineral Leasing Act, it would be a waste of judicial time and effort for this court to adjudicate the far more complicated NEPA issues which would, in that event, be reduced to hypothetical questions." Motion of Respondents for Partial Summary Judgment, May 12, 1972, p. 1.

3. Before discussing these developments, respondents feel constrained—in view of petitioners' one-sided summaries—to place the principal NEPA issue in what we submit is its proper factual context. The ultimate question, as the court of appeals has said, and as Secretary Morton has himself acknowledged, is which of two *feasible* alternatives will be adopted: (1) an oil pipeline route across Alaska, *plus* marine tanker transport of oil along the West Coasts of the United States and Canada, *plus* a completely separate pipeline route for North Slope natural gas across Canada (hereafter the "Alaska Pipeline alternative"), or (2) one all-land trans-Alaska-Canada route that would provide a common corridor for oil and gas pipelines to Midwest markets (hereafter the "Canadian alternative"). Gov. Pet. App. A 88a; Secretary Morton's Statement of Reasons, Gov. Pet. App. C 173a-174a.

It is respondents' position that "from the beginning of its consideration of the oil companies' proposal to construct a trans-Alaska oil pipeline the Department of the Interior has been aware that if North Slope oil resources are developed at all natural gas (which is an inevitable byproduct of oil extraction) will be transported to market [by the very oil companies proposing the trans-Alaska oil pipeline] by means of an all-land pipeline route through Canada." (Footnote omitted.) Gov. Pet. App. A 87a. The obvious question, therefore, has always been: If there is going to be a route across the Canadian Arctic in any

event, might there not be substantial environmental and economic savings from using a single all-land route for oil and gas pipelines? Yet, because the oil companies mentioned only North Slope oil in their proposal to the Interior Department, the Department has consistently focused only on oil—almost as if the natural gas, and the alternative of an all-land common corridor, did not exist. Secretary Morton has repeatedly articulated his Department's passive approach: "The scope of our work here is to deal with applications on our desk." *E.g.*, *Hearings, Senate Committee on Interior and Insular Affairs*, 92d Cong., 1st Sess. 454 (April 29, 1971). See Gov. Pet. App. A 88a-89a.[7]

---

[7] The Department's approach to the Canadian alternative was well-summarized by Secretary Morton on March 9, 1972, only eleven days before release of the final impact statement:

> "We have no formal discussions going on with any element of the Canadian Government. The prime discussions have been between the Canadian Government and the applicants. . . . The only way [Canadian Government expressions of interest in an all-land route] could change the plans is if a Canadian alternative was developed, and we had an application which we could consider of an alternative route through Canada. This could very well change the plans of the present applicants, but we have to remember that this is not a Government project." *Hearings, Senate Committees on Public Works and Interior and Insular Affairs*, 92d Cong., 2d Sess. 404-405 (March 9, 1972).

This passive approach stands in marked contrast to the role the Secretary has announced he will assume in helping the oil

The Department's ostrich-like approach to the Canadian alternative has been, in respondents' view, remarkably similar to the approach it took to the Mineral Leasing Act problem. The Department's draft impact statement of January 1971 (cited at Gov. Pet. 9-10) was severely criticized for its failure even to mention North Slope natural gas and the alternative of an all-land common corridor.[8] Yet, de-

---

companies transport North Slope natural gas across Canada, if that is their desire:

> "[W]e are going to . . . work and stimulate and motivate a consortium to get together and put the money up to build a cold gas pipeline, which through Canada is the logical way for it to go." Interior Department Transcript of Secretary Morton's Press Conference of September 13, 1972, at 38.

[8] For example, in a statement dated March 12, 1971, criticizing the draft, the Administrator of the Environmental Protection Agency asserted:

> "[A] Mackenzie Valley pipeline would not cross an area of major seismic activity, as a trans-Alaska pipeline would. Overland transport from Prudhoe Bay directly to Chicago would not require transfer facilities from pipeline to ocean tankers and would not require a large fleet of tankers to operate along the coastline from Alaska to California. Even if a substantial portion of the oil were transported by pipeline to the West Coast, tanker transport and tanker facility requirements would seem to be considerably reduced.
>
> "There is a high probability that, given Canada's interest in opening up its interior reserves and the Alyeska Pipeline Company's apparent intention to construct a pipeline through the Mackenzie Valley to transport natural gas from Prudhoe Bay, at least one and possibly two pipelines already will be constructed across the Mackenzie

spite this unambiguous early warning, it was not until February 1972, just one month before publication of the final impact statement, that the Department decided to include in the statement any discussion at all of North Slope natural gas. See Gov. Pet. App. A 88a. And then, the Department did not even ask the oil companies to disclose their plans for the natural gas; and it did not seek to acquire from either private industry or the Canadian Government basic information that would be essential for any meaningful evaluation. Brew Dep. 28-29, 113-115.[9] Nor, as respondents have contended, did the Department ever undertake to determine what the potential environmental savings might be from the Canadian common corridor alternative. Brew Dep. 34-35.[10]

Valley. It would seem preferable, from the point of view of minimizing environmental impact, to use a single route for more than one pipeline rather than having multiple pipeline routes." See Final Impact Statement, vol. 6, p. A-42.

[9] Dr. Brew was the Interior Department geologist responsible for drafting the final impact statement.

[10] Respondents contend that nowhere in the final impact statement generally, or in the "500-page volume . . . devoted . . . to . . . possible alternatives" (Gov. Pet. 10) is the alternative of an all-land common corridor for oil and gas pipelines analyzed. See Gov. Pet. App. A 88a. The so-called "consideration" given to the alternative trans-Alaska-Canada common corridor in the "option papers and memoranda," referred to at Gov. Pet. 11, amounts to no more than what one could deduce merely from glancing at a map. Specifically, on the day before Secretary Morton announced his decision to ap-

4. The opinion below accurately sets forth the general thrust of the opposing positions on the Canadian alternative issue. Gov. Pet. App. A 86a-90a. As the court recognized, "This and other NEPA issues [11] presented by the parties to this action pose complex and important questions regarding the duties of administrative agencies under NEPA." (Footnote added.) *Id.*, at 90a. But, assuming that the court of appeals correctly construed the technical issues presented by the Mineral Leasing Act, its decision not to address the NEPA issues was obviously correct.

a. Secretary Morton has himself stated, in testimony given to the Joint Economic Committee *after* the announcement of his decision to approve the Alaska Pipeline (cited at Gov. Pet. 14 n.5), that he would "scrap $300 million and all of the work that has been done" on the Alaska Pipeline, if the balance of factors in the national interest were changed (J.A. 106). By the time Congress removes the current Mineral Leasing Act width limitation (if that is all Congress does), there may be substantial developments

---

prove the Alaska Pipeline, the individual in the best position to know—Dr. Brew, the drafter of the impact statement—informed his superiors that a common corridor analysis had not, but should have been, undertaken, and that if it had been undertaken it would have undoubtedly disclosed that "the joint oil and gas trans-Canada corridor is clearly to be preferred on environmental grounds." Ad. Rec. 2.15.

[11] See p. 10 n. 5, *supra*.

BLEED THROUGH POOR COPY

that will materially alter the balance of economic, environmental, and other factors bearing on the Canadian alternative. Indeed, a number of recent developments—summarized in the appendix to this brief—may have already materially altered that balance.[12]

b. Equally important is the court's awareness that the terms and conditions of any legislation passed by Congress will be directly germane to any NEPA analysis. This would be true even if Congress were merely to remove the current Mineral Leasing Act width limitation. For example, one of the principal bills now under consideration (S. 1081, sponsored by Senator Jackson) would make "common corridors"

---

[12] The developments cited in the appendix to this brief—especially the continuing initiatives of private industry and the Canadian Government concerning the Canadian alternative—demonstrate the transparency of Alaska's claim that "the Canadian alternative is not a real one." Ala. Pet. 30.

Nevertheless, the continuing dispute among the parties over such basic underlying matters—particularly regarding the data available and the efforts that the Interior Department has undertaken to develop, collect, and analyze data that would contribute to an informed assessment of the Canadian alternative—lends support to the court of appeals' conclusion that the district court did not perform its responsibility to refine the record and place the legal issues in an appropriate context for judicial review. Gov. Pet. App. A 91a-93a. Certainly, when the parties presented their case to the district court, no one anticipated that the court would issue only the broad legal conclusions that accompany its judgment. See Gov. Pet. App. D 179a-182a.

the preferred method for rights-of-way across public lands. Such a requirement would constitute a new and independent factor to be considered in any review of the multiple rights-of-way now contemplated for North Slope oil and natural gas.

There is, moreover, the distinct possibility that Congress will itself decide the "vital national questions" relating to the "routing and construction of a pipeline for Alaska's North Slope." Opening Statement by the Chairman, Senator Jackson, *Hearings Before the Senate Interior and Insular Affairs Committee on Pending Legislation to Establish a Federal Policy Concerning the Granting of Rights-of-Way Across Federal Lands*, 93d Cong., 1st Sess. 3 (March 9, 1973). At least four bills have been introduced that would produce this result.[13] Enactment of such legislation would presumably moot entirely the NEPA issues in the case.

The critical point is that Congress will, by adopting or refusing to adopt any of several pending legislative solutions, dispose of each of the policy issues —including the basic issue of whether the energy needs of the country and/or the revenue needs of the State of Alaska require immediate construction of

---

[13] S. 970, S. 993, H.R. 4707, H.R. 5750. See pages 7-8, *supra*.

the Alaska Pipeline [14]—that petitioners have urged upon this Court as reasons for granting review.

---

[14] The nation's needs for energy and the effect of Alaskan oil on alleviating those needs will undoubtedly be considered by Congress in light of the fuel shortages of last winter which occurred in the Midwest and East (where the Canadian alternative would deliver oil), not on the West Coast (to which oil from an Alaska Pipeline would be shipped). See appendix, *infra*.

The importance of the Alaska Pipeline to revenue for the State of Alaska and the Alaskan natives will undoubtedly be balanced by Congress against the energy needs of the Midwestern and Eastern states. Congress can also be expected to take cognizance of the Interior Department's own finding that "the amount of State revenue will not differ significantly under either the trans-Alaska pipeline system or a Mackenzie Valley pipeline system, assuming a 2 million barrel per day throughput of Alaskan oil through either system." *Interior Department's Analysis of the Economic and Security Aspects of the Trans-Alaska Pipeline*, vol. I, p. 8.

CONCLUSION

The sooner this phase of the litigation is terminated, the sooner will the issues be confronted squarely by Congress. The public interest, including that of sound judicial administration, will best be served by denial of the petitions for a writ of certiorari.

Respectfully submitted,

DENNIS M. FLANNERY
JOHN F. DIENELT
THOMAS B. STOEL, JR.
1751 N Street, N.W.
Washington, D.C. 20036

Attorneys for The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth

EDWARD BERLIN
1712 N Street, N.W.
Washington, D.C. 20036

Attorney for David Anderson and Canadian Wildlife Federation

THOMAS F. HOGAN
WARREN W. MATTHEWS, JR.
THEODORE R. DUNN
100 South Washington Street
Rockville, Maryland 20850

Attorneys for The Cordova District Fisheries Union

Of Counsel:

VICTOR H. KRAMER
600 New Jersey Ave., N.W.
Washington, D.C.

PHILIP ELMAN
1320 19th Street, N.W.
Washington, D.C.

JAMES W. MOORMAN
311 California Street
San Francisco, California

APPENDIX OF DEVELOPMENTS

1. The fuel (oil and natural gas) shortages experienced in the Midwest and East this past winter would seem to require a reevaluation by Secretary Morton of his earlier conclusion that the West Coast (which experienced no such shortages) is the "preferable primary market for North Slope oil." Gov. Pet. App. C 163a. The Midwest and East would be served by the Canadian alternative; their oil shortages will not be helped by the Alaska Pipeline.

2. Canadian Arctic Gas Study, Limited, a group of Canadian and United States-owned companies (including several of the companies proposing the Alaska Pipeline) announced on February 27, 1973, that it will file applications with United States and Canadian Government agencies by late this summer for permission to build a natural gas pipeline from Prudhoe Bay through the Mackenzie Valley. (Press Release, February 27, 1973).

3. Mackenzie Valley Pipe Line Research, Limited, made up of several Canadian and United States owned-companies (including companies owned by firms active on the North Slope), issued, on January 22, 1973, a report summarizing its studies to date. The report concluded that a trans-Alaska-Canada *oil pipeline* is environmentally and economically feasible and could be completed in a substantially shorter time frame and at a substantially lower cost than the estimates previously cited by the Interior Department. (Press Release, January 22, 1973).

4. In addition to these private initiatives, studies sponsored by the Canadian Government, referred to by the court of appeals (Gov. Pet. App. A, 91a-92a), have continued in the year since Secretary Morton announced his decision. A comprehensive description of the studies already completed and the anticipated publication date of those nearing completion are contained in *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 4, Canadian House of Commons, 29th Parliament, 1st Sess., March 1, 1973.

5. On March 18, 1973, in an interview on national television in Canada, Canadian Minister of Energy, Mines, and Resources, Donald Macdonald, strongly reasserted his Government's consistent position [1] in favor of construction of a common corridor for oil and gas pipelines through the Canadian Arctic: "If the Americans came back and said to us, look, we've had

---

[1] From the earliest days of the Interior Department's consideration of the Alaska Pipeline proposal, the Canadian Government has consistently indicated that it favors construction of oil and gas pipelines through the Canadian Arctic. Ad. Rec. 4.3.2.1, Vol. IV, Tab I, Exs. 1-16. The reasons it has cited for this position are (a) its desire to avoid serious environmental and economic damage to the coastal waters of British Columbia that will be caused by the marine leg of the Alaska Pipeline proposal; (b) its realization that environmental disturbance will occur in any event from construction of a gas pipeline across the Canadian Arctic; and (c) its desire to open up Canada's own Arctic oil and gas resources. See, *e.g.*, letter from Minister Macdonald to Secretary Morton, May 4, 1972 (Plaintiffs' Ex. 1 to the Deposition of Deputy Undersecretary Carter).

second thoughts on that Trans-Alaska Pipeline, we would like to take you up on your willingness to entertain an application about the oil line through the Mackenzie Route, I think the interests of the West Coast [of Canada] would dictate that he Government of Canada should enable that kind of application to go ahead." Transcript of Interview 5. In the same interview, Minister Macdonald renewed the offer of the Canadian Government, made earlier on April 19, 1972 (Ad. Rec. 4.3.2.1, Vol. IV, Tab I, Ex. 26), to supply additional amounts of secure oil to the United States for the period pending completion of the Canadian alternative. Transcript of Interview 4-5.

6. A recently released study by the National Oceanic and Atmospheric Administration (NOAA)—MARMAP Red Flag Report (No. 1), *Fish Larvae Found In Environment Contaminated With Oil and Plastic*, January 18, 1973—indicates that the Government has heretofore grossly understated both the extent, pervasiveness, and seriousness of oil pollution in the world's ocean waters.[2] The Interior Department's own experts have concluded that over the life of the Alaska Pipeline as much as 140,000 barrels of oil may be spilled in an average year into the ocean

[2] The study was the subject of editorial comment in *The New York Times* (February 18, 1973) and *The Washington Evening Star* (February 16, 1973) and extensive comment in *The Washington Post* (February 13, 1973) and the *CBS Evening News* (February 12, 1973).

waters of the Northeast Pacific (along the coasts of the United States and Canada) as a result of casualties involving tankers carrying North Slope oil. Final Impact Statement, vol. 4, p. 474. The Canadian alternative would, of course, require no marine transport of North Slope oil.